tract for failure properly to perform, but in tort for misdoing.[24] And so in the situation under discussion, there may well be two liabilities, each with its own content. That New York has chosen to affirm the doctrine of implied warranty of wholesomeness is no cause for reproach—if only she does not for that reason disaffirm the rule of liability in tort.

FOREIGN CORPORATION TAXES AND INTERSTATE COMMERCE

The decision of the Supreme Court in the recent case of *International Paper Company v. Massachusetts* (1918) 38 Sup. Ct. 292, is of importance in that it reaffirms in the broadest language the doctrine laid down in the earlier case of *Western Union Telegraph Company v. Kansas*,[1] which there was reason to think had been considerably narrowed by later cases.

It will be remembered that in the *Western Union* case the court decided that a license fee imposed upon a foreign corporation for the privilege of doing local business and based upon a given per cent of its entire authorized capital was unconstitutional. It held that such a fee was necessarily "a burden and tax on the company's interstate business. . . . Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business."

The Western Union was a corporation engaged in interstate commerce, and its interstate business was so intimately connected with its intrastate business that they could not be separated as an economically sound business proposition.

Later decisions of the court, upholding statutes differing somewhat from that in question in the *Western Union* case were thought to limit the broad doctrine laid down in that case.[2] This was particularly true of the case of *Baltic Mining Company v. Massachusetts*.[3] In that case the court held constitutional a tax which was imposed for the privilege of doing local business and based upon the total authorized capital, but with a maximum limit of $2000. This act had been construed as not applying to corporations whose sole business was interstate commerce or which carried on interstate and intrastate business in such close connection that the intrastate business could not be abandoned without serious impairment of the interstate business of the corporation.[4] The Baltic Mining Company was

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[24] (1917) 26 YALE LAW JOURNAL, 486.

[1] (1910) 216 U. S. 1, 30 Sup. Ct. 190.

[2] See cases cited in the principal case.

[3] (1913) 231 U. S. 68, 34 Sup. Ct. 15.

[4] See *Baltic Mining Co. v. Commonwealth of Massachusetts* (1911) 207 Mass. 381, 93 N. E. 831, at end of opinion.

described as carrying on "a purely local and domestic business quite separate from its interstate transactions." Contrasting this state of facts with the situation in the *Western Union* case, and holding that "Every case involving the validity of a tax must be decided upon its own facts," the court came to the conclusion that in the *Baltic Mining Co.* case the authorized capital was used in truth only as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce.

This language led constitutional lawyers to believe that the doctrine of the *Western Union* case would not be applied where the tax, though based upon total authorized capital, was laid upon and made the condition of doing a purely intrastate business, economically separable from interstate business.

The decision in the *International Paper Company* case, however, upsets this belief and reaffirms the broad language of the *Western Union* case. The statute, as construed by the court, was identical with that in the *Baltic Mining Co.* case, except that the maximum limit had been removed. The court now makes no mention of the fact that the intrastate and interstate business are separable, but lays down the broad rule that no excise tax, based upon total authorized capital, without maximum limit, may be laid upon a foreign corporation for the privilege of doing local business. It is apparent therefore that the separability of local and interstate business no longer enters into the question, and that the earlier decision in the *Baltic Mining Co.* case must stand wholly on the maximum limit.

The reason for this distinction seems unsatisfactory, since to the small corporation which does not receive the benefit of the limited maximum the tax under either statute equally affects its interstate commerce. Possibly the distinction may be justified on the ground that where there is no maximum the intention is evident to measure the tax by the whole business capital, both interstate and intrastate, which necessarily in every case means that the tax is greater if interstate commerce is greater, thus burdening interstate commerce, while where there is a reasonable maximum this intention is not manifest and the fact that it may burden interstate commerce in the case of small corporations is incidental only and not the intended effect of the statute. Hence the statute may be upheld as being a local regulation which merely incidentally affects interstate commerce, as has frequently been held of police regulations. This explanation, however, is not wholly satisfactory and it is to be hoped that the court will see fit more clearly to enunciate the grounds of its decision in future cases.[5]

W. W. G.

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[5] For a full discussion of these cases see a series of articles (not yet completed) on *"Indirect Encroachment on Federal Authority by the Taxing Powers of the State"* by Thomas Reed Powell, in (1918) 31 HARV. L. REV. 321, 572, 721, 932.